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In The
Supreme Court Of The United States
October Term, 1948

No. 8[redacted]124

JOHN L. FAHS, U. S. Collector of Internal Revenue for the District of Florida,

Petitioner,

vs.

NEW DEAL CAB COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The NEW DEAL CAB COMPANY by its undersigned attorneys respectfully submits this its Brief in Opposition to the Petition for a Writ of Certiorari.

OPINIONS BELOW

The opinion of the District Court (R. 254-261) is not re-

ported. The opinion of the Court of Appeals is reported in 174 Fed. 2nd, 318.

JURISDICTION

The judgment of the Court of Appeals was entered on May 3, 1949. (R. 290). The Petitioner has invoked the jurisdiction of this Court under 28 U. S. C. 1254, as will appear from the Petition.

STATEMENT

This is a suit for the recovery of Social Security taxes collected from the New Deal Cab Company, a corporation, under the Federal Insurance Contributions Act for the quarters ending March 31, 1941 through December 31, 1943, in the amount of $4,626.63, and under the Federal Unemployment Tax Act for the Years 1941 through 1943 in the amount of $1,387.99 (R. 274). The District Court held that the drivers of the company's taxis were the company's employees for Social Security purposes and that the taxes had been legally collected (R. 280-281). The Court of Appeals for the Fifth Circuit reversed the District Court and held that the drivers were not the company's employees. (R. 286-290).

The Petitioner sets forth the facts as found by the District Court in its Petition, but in making such findings the District Court was apparently confused with the facts in another case, involving another cab company, tried by other counsel on the same day. Some of these facts were clarified by the Court of Appeals and we, therefore, quote the facts as set forth in the opinion of the Court of Appeals (R. 287-290).

"Beginning prior to 1937 this corporation has been furnishing transportation to colored citizens in Jacksonville, Florida, by taxicabs it owned or controlled, driven by colored drivers * * * *. The drivers were members of Colored Taxicab Dri-

vers Local Union No. 674, A. F. of L., which for them made a written contract between the Union and the Company in effect during the tax years. That contract states the terms on which the cabs were operated. Its first provision is: -

> "The said Union shall be the sole representative of the drivers who rent automobiles from said company for use as taxicabs * * * in all collective bargaining had by lessees with the company. The said company shall not rent automobiles for use as taxicabs and shall permit taxicabs operated in its name only by members of said Union or persons eligible for membership, except as hereinafter provided."

"Rent" and "lessee" are the words used throughout. New drivers are required to join the Union. This Union is to handle all grievances and disputes, and if need be, arbitrate them. Article 5 is: -

> "The company agrees that the taxicab rental to be charged to lessees shall be as follows: From May 1 to October 31, shall be $3.55 for the day shift and $2.85 for the night shift. From November 1 to April 1, the rental shall be $3.50 for the day shift and $3.00 for the night shift. The above charges shall include the cost of all lubricating oil used by the taxicabs, which is to furnished by the company."

"Gasoline is to be purchased by the drivers from the company at a price two cents less than the prevailing filling station price, and be of regular grade. If a taxicab breaks down for an hour or more, or is in the shop to be repaired or serviced or greased, the rental charge is adjusted accordingly. If drivers are charged with any infraction of a City Ordinance or the rental agreement, company action will be postponed for

an investigation and hearing. It is agreed that there shall be no refusal to rent taxicabs and no strikes without the company and Union using all possible means for a peacful settlement. A lessee shall not be charged for damages to a taxicab until a stated hearing is had on the question of negligence, nor shall he be charged more than $10.00 for one accident, and not more than the cost of repair. No lessee shall be charged by the company for damages for personal injuries. Seniority rights are established, and a list of taxicab lessees is kept by the company. Except for dishonesty or drunkardness the company will not permanently refuse to rent taxicabs to any lessee without a hearing participated in by the Union, but a lessee without a City permit or who is unsatisfactory to the company's insurance carrier shall in no event be rented a cab. The insurance referred to is of public liability and property damage insurance, which the contract permits, requiring observance of the insurer's rules and regulations."

"Under this contract the practice was for the company in its garage adjacent to its parking lot to keep cars serviced and in repair. The drivers for each shift reported at 4:45 A. M. and 4:45 P. M., each selected his car, filled it with gasoline, and drove away. He kept a deposit of $10.00 as security. When he returned the car at the end of the shift he paid the rental, and for the gasoline used, making no report of where he had been or what he had earned. He was under no control by the company and had no instructions as to where he should seek patrons, what he should charge them, or what he should do with the car. He could use it for his own purpose, for a trip, or even to go fishing. The company's only interest was to get its rental and pay for gasoline. It did for a part of the time have four or five 'phones in remote parts of the colored district of the city where there were no private 'phones, but these were not for cab stations or for the drivers to report their whereabouts, but to report flat tires or breakdowns so that aid might be sent. If a patron 'phoned the office for a cab, there was no way to send one unless to waive one down on the street,

and the driver then was free to answer the call or not, as he wished. The company did not, as the District Judge found, cruise the city to observe infraction of its rules. The cruising, when done, was by the insurance carrier, as provided in the contract."

" * * * * The dominion of the driver over his cab in practice was so complete as to be truly described as a "rental" of it. When habitual, he is referred to as a "lessee" of it. But it is undeniable that the company itself was running a business of carrying passengers for hire rather the mere casual renting of cars; for it had a city license to do so, and there would be little demand for its cars otherwise. But it could, if it chose, get the work done by independent contractors instead of by hired employees. This is in effect what it did, but in a very loose way, because the drivers did not expressly agree to accomplish this work. Self interest alone seems to have been relied on, for hauling passengers would be the driver's best source to make money, and to meet his positive obligation to pay rental and for gasoline. The company paid him no wages and promised him none. He took the entire risk of his day's business, and might lose instead of gaining. He chose where he would go and what he would do, or whether he should go at all. He was wholly independent, though only vaguely a contractor, except for car rental. What he took in was his. If he ran away with the money there would be no embezzlement. The amount earned was of no concern to the company till the demand was made for these taxes, measured by wages, and tax investigators demanded that the earnings be approximated. The men were then asked to estimate their average take, and a few cents per day were additionally collected for their part of the tax in the daily settlements."

REASONS FOR NOT GRANTING WRIT

The petition for certiorari filed by the petitioner in this case gives no valid reason for granting the writ.

Rule 38 of this Court provides for special and important reasons for granting the writ of certiorari, among which are: "Where a Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter, or has decided an important question of Federal law which has not been, but should be, settled by this Court." We are unable to find any rule or case that provides that "if certiorari is granted in *Fahs* v. *Economy Cab Co.*, certiorari should also be granted in this case." (Petitioner's reason for granting the writ)

As counsel for New Deal Cab Company, we have no opportunity or right to oppose the granting of certiorari in *Fahs* v. *Economy Cab Co.*, 174 Fed 2nd 321. We are not counsel in the case of *Fahs* v. *Economy Cab Co.*, and have never been served with, nor have we seen the transcript of record in that case. To contend that the New Deal Cab Company is controlled by whatever may be decided in the *Fahs* v. *Economy Cab Co.*, case is to deny New Deal Cab Company the right to oppose the granting of the writ in this case. The Supreme Court has been diligent and jealous of the protection of the rights of litigants in the presentation of their cases to the Court. This Court has required strict observance of its rules by holding that a failure to comply therewith will be a sufficient reason for denying the petition. *United States* v. *Rimer*, 220 U. S. 547, 31 S. Ct. 596, 55 L. Ed. 578; *Furness, Withy & Co.* v. *Yang-Tsze Insurance Ass'n.*, 242 U. S. 430, 37 S. Ct. 141, 61 L. Ed. 409, *Magnum Import Co.* v. *Coty*, 262 U. S. 159, 163, 43 S. Ct. 531, 532, 67 L. Ed 922.

We desire this Court to understand that this case and *Fahs* v. *Economy Cab Co.*, are separate and distinct cases. The parties are different, the trials were separate, different counsel, different facts, one involving colored drivers while the other involved white drivers. In fairness to this Court, the New Deal Cab Company and to counsel the granting of certiorari in this case must be determined on the record of this case alone. The

petition has therefore failed to give any reason for granting the writ.

THERE IS NO CONFLICT IN DECISIONS

The petition for certiorari in this case does not cite another case with which there is a conflict. The petition does not even state that the writ should be granted in this case for the same reasons set forth in *Fahs* v. *Economy Cab Co.* In order to protect our client to the best of our ability under the circumstances we must assume that the petitioner contends that there is a conflict between the decision of the Circuit Court of Appeals in this case and the Circuit Court of Appeals for the Tenth Circuit in the case of *Jones* v. *Goodson*, 121 Fed. 2nd. 176. We are unable to find any conflict in the decision of the Tenth Circuit Court of Appeals and the instant case. In both cases the liability for Federal Social Security Taxes was involved and the common law doctrine of Master and Servant was applied. The resulting decisions on the facts were different because the same law applied to different facts required that result. A brick mason, a carpenter or a taxi driver may be an employee or an independent contractor or a lessee under different circumstances.

In *Jones* v. *Goodson*, *supra*, the Court found that:

1. The contract between the Company and the drivers provided "that the company had the absolute right at its own discretion to reject the application of any person seeking employment, and to suspend or dismiss any lessee for violation of the printed rules then or thereafter in effect."

2. The drivers were allowed a specified maximum mileage per shift.

3. The company had the right at its option to oper-

ate the taxicabs on a percentage basis, in which event the fares collected were divided on a specified basis.

4. Drivers were required to operate within the City.

5. Drivers were required to call the central office of the company hourly in order that the company might know they were operating and were within the City.

6. Drivers were required to maintain a good record for accidents, required to be courteous to customers, and required to be presentable in their personal appearance.

The Court held that the company's direction and control of the drivers was substantial and they were employees.

In the instant case the above facts do not appear, as this Court will see from the statement of facts by the Circuit Court of Appeals in this case. We find a contrary set of facts: -

1. The contract between the Company and the Union provided that there should be no refusal to rent taxicabs and no strikes without the Company and Union using all possible means for a peaceful settlement. (R. 288)

2. The drivers were not limited in mileage. "He chose where he would go and what he would do or whether he would go at all." (R. 289)

3. The Company had no right to any part or percentage of the drivers' take. The Court found "what he took in was his. If he ran away with the money

there would be no embezzlement." (174 Fed. 2nd 321) (R. 289)

4. Drivers could operate anywhere and were not restricted to the City. (R. 289)

5. Drivers were not required to call the Company to report their whereabouts. (R. 289)

6. The Court in its opinion found "He was under no control by the Company and had no instructions as to where he should seek patrons, what he should charge them, or what he should do with the car. He could use it for his own purpose, for a trip, or even to go fishing." (174 Fed. 2nd 320) (R. 289)

There is, therefore, no conflict between these two cases, as the same principle of law was correctly applied in both. The only purpose sought by the petition in this case is to obtain another hearing. Certiorari will not be granted for such purpose. In *Magnum Import Co* v. *Coty*, 262 U. S. 159, 163, 43 S. Ct. 531, 532, 67 L. Ed. 922 this Court in discussing the writ, said: -

> "The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing."

CONCLUSION

The petition for a writ of certiorari should not be granted.

Respectfully submitted,

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